Supreme Court, U.S.
FILED
MAY 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 87-1312

In the Supreme Court of the United States

OCTOBER TERM, 1987

FREEMAN PAWNEE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
ROGER J. MARZULLA
Assistant Attorney General
ROBERT L. KLARQUIST
MARTIN W. MATZEN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

14pp

QUESTIONS PRESENTED

1. Whether petitioners' complaint—alleging that the United States breached a fiduciary obligation to ensure that petitioners received gas royalties determined by the highest price paid or offered for like quality gas at the time of production in the same county of production—stated a claim.

2. Whether the court of appeals erred in upholding the dismissal of petitioners' lawsuit on the ground that the complaint failed to state a claim, without giving petitioners leave to amend.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	11

TABLE OF AUTHORITIES

Cases:

City of Las Vegas v. *Clark County*, 755 F.2d 697 (9th Cir. 1984) 8, 9
Fairview Township v. *United States Environmental Protection Agency*, 773 F.2d 517 (3d Cir. 1985) 9
Getty v. *Reed*, 547 F.2d 971 (6th Cir. 1977) 9
Hoohuli v. *Ariyoshi*, 741 F.2d 1169 (9th Cir. 1984) 8
Katter v. *Arkansas Louisiana Gas Co.*, 765 F.2d 730 (8th Cir. 1985) 9
United States v. *Mitchell*:
445 U.S. 535 (1980) 7
463 U.S. 206 (1983) 4, 6, 7, 8
Vaughan v. *First Nat'l Bank*, 218 F.2d 804 (5th Cir.), cert. denied, 350 U.S. 854 (1955) 9
Williford v. *California*, 352 F.2d 474 (9th Cir. 1965) 9
Wong v. *Bell*, 642 F.2d 359 (9th Cir. 1981) 9

Statutes, regulation and rule:

Tucker Act:
28 U.S.C. 1346(a)(2) 3
28 U.S.C. 1491 6
25 U.S.C. 396 ..... 2, 3
25 C.F.R. 212.16 ..... 2, 8, 9
Fed. R. Civ. P. 12(b)(6) 9

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1312

FREEMAN PAWNEE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 830 F.2d 187. The opinion of the Claims Court (Pet. App. 15a-23a) is unreported. A related opinion of the United States District Court for the Western District of Oklahoma (Pet. App. 24a-27a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13a) was entered on September 28, 1987. The court of appeals denied rehearing and rehearing en banc by orders dated November 10 and November 25, 1987 (Pet. App. 11a-12a). The petition for a writ of certiorari was filed on February 5, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are Indians who hold beneficial ownership of 160 acres of mineral acreage in Canadian County, Oklahoma. The United States holds legal title to this land, in trust for petitioners. In 1957, and again in 1963, White Buffalo, petitioners' predecessor in interest, with the consent and approval of the then Secretary of Interior, entered into oil and gas leases of the lands, pursuant to 25 U.S.C. 396. Pet. App. 2a-3a, 15a, 24a.[1] The leases provided that the Secretary would collect royalties on behalf of petitioners from the lessees (*id.* at 3a). The leases further provided, in accordance with the governing regulation (25 C.F.R. 212.16), that, for purposes of determining the royalties to be paid, the " 'value' of gas 'may, in the discretion of the Secretary, be calculated on the basis of the highest price paid or offered * * * at the time of production for the major portion of the * * * gas produced and sold from the field where the leased lands are situated, and the actual volume of the marketable product less the content of foreign substances. * * * The actual amount realized by the lessee from the sale of said products may, in the discretion of the Secretary of the Interior, be deemed mere evidence of or conclusive evidence of such value" (Pet. App. 21a; 25 C.F.R. 212.16).

---

[1] Section 396 (25 U.S.C.) provides in pertinent part:

> All lands allotted to Indians in severalty * * * may by said allottee be leased for mining purposes for any term of years as may be deemed advisable by the Secretary of the Interior; and the Secretary of the Interior is authorized to perform any and all acts and make such rules and regulations as may be necessary for the purpose of carrying the provisions of this section into full force and effect * * *. The Secretary of the Interior shall have the right to reject all bids whenever in his judgment the interests of the Indians will be served by so doing, and to readvertise such lease for sale.

2. Petitioners brought this action in the United States District Court for the Western District of Oklahoma, alleging that the Secretary had breached a fiduciary duty—purportedly owed to petitioners—to collect royalties based on the highest price paid or offered for any gas produced and sold from the same gas field at the time of production (Pet. App. 25a). Because the damages sought by petitioners exceeded $10,000,[2] the district court found that it lacked jurisdiction under 28 U.S.C. 1346(a)(2), and it accordingly transferred the case to the Claims Court (Pet. App. 24a-27a).

The Claims Court dismissed the action for want of jurisdiction (Pet. App. 15a-23a). It first found (*id.* at 16a-17a) that 25 U.S.C. 396, on which petitioners had principally relied (Pet. App. 16a), did not confer a right to a damage remedy against the United States for breach of a fiduciary duty. Moreover, the court noted, "none of the other substantive statutes [petitioners] cite in their second amended complaint give rise to monetary damages" (*id.* at 17a). The Claims Court next rejected the contention (*id.* at 18a) that the asserted fiduciary duty could be inferred from extra-statutory sources showing the "pervasive role" and "elaborate control" that the United States has assumed over the management of petitioners' assets.[3] The court emphasized (*ibid.*) that a fiduciary obligation may

---

[2] Petitioners sought damages of not less than $1 million for themselves, and an additional $500 million for the class they purported to represent (Pet. App. 3a).

[3] The Claim Court specifically noted (Pet. App. 17a-18a) that petitioners had "disclaim[ed] any suggestion that either the statutes and regulations or the leases were breached; indeed, they say they were not." Moreover, the court noted, petitioners had "den[ied] they are asking for recoupment of royalty deficiencies" (*id.* at 20a); put another way, petitioners had admitted that the Secretary collected all of the royalties that were due under the terms of the leases.

only "evolve[] from the intent of Congress evidenced by statutory authorization for the activity at issue." Distinguishing this Court's decision in *United States* v. *Mitchell*, 463 U.S. 206, 216 (1983) (*Mitchell II*), the court found, from its reading of the governing statutes and regulations (Pet. App. 18a-19a), that the Secretary's role in managing petitioners' assets is "minimal" (*id.* at 18a). The court explained (*id.* at 21a), moreover, that the Secretary had calculated the royalties in accordance with the plain terms of the leases and the governing regulations, and it refused to embrace a "posited fiduciary duty" that would require the government to "supercede both the leases and the regulation, and calculate the royalties differently for a higher return for the years the leases have been in effect" (*ibid.*). Rejecting petitioners' "expansive theory," the Claims Court concluded (*id.* at 23a):

> [I]n this court's view, there must be clear congressional authorization, absent here, for substituting a new obligation for the provisions of the leases agreed to by the parties, and [provided in] the regulations.

3. The court of appeals affirmed on somewhat different grounds (Pet. App. 1a-10a). It agreed with petitioners (*id.* at 6a (footnote omitted)) "that the United States has a general fiduciary obligation toward the Indians with respect to the management of th[e] oil and gas leases." The court held, however, that the existence of a general fiduciary relationship "does *not* mean that any and every claim by the Indian lessor necessarily states a proper claim for breach of the trust" (*id.* at 7a (emphasis in original)). Rather, the court explained (*id.* at 9a (quoting *Mitchell II*, 463 U.S. at 224)), to be legally cognizable, a fiduciary relationship must "spring[] from the statutes and regulations which 'define the contours of the United States' fiduciary responsibilities.' " The court of appeals

found that there were no statutes or regulations from which to infer the particular fiduciary duty asserted by petitioners. To the contrary, the court observed (Pet. App. 8a), petitioners' claim "runs counter to the governing regulations and the terms of the leases." In particular, whereas petitioners were asserting a right to royalties based on the highest market price at the time and place of production, "the governing regulation and the leases expressly restrict the highest price '*for the major portion*' of the gas 'produced and sold from the field where the leased lands are situated' " (*ibid.* (citation omitted; emphasis in original)).[4] Thus, the court concluded, petitioners' claim "is simply that the Interior Department is compelled to go contrary to and beyond the regulations and the leases in order to fulfill its alleged fiduciary obligation to [petitioners]" (*id.* at 9a). This, the court of appeals held, "is a proposition we cannot accept" (*ibid.*):

> Where, as in this case, the regulations and the leases deal directly with the problem and are not challenged, [petitioners] cannot demand that the United States ignore those provisions or act contrary to them. The scope and extent of the fiduciary relationship * * * is established by the regulation and leases. [Petitioners] cannot create a viable fiduciary claim purely by insisting that this court (or the Claims Court) establish

---

[4] The court of appeals also noted that petitioners had made no claim that the leases here "were imprudently or illegally consummated" (Pet. App. 9a). Indeed, the court observed that petitioners had disavowed any challenge to the applicable federal regulation and corresponding lease terms governing the method of royalty calculation and, moveover, that petitioners did not contend that the government failed to collect all the royalties due under the provisions of the regulation and the leases (*id.* at 7a n.6, 8a-9a).

different or higher standards. That is a function solely of Congress or its delegates, not of the courts acting on their own.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Accordingly, further review is not warranted.

1. Petitioners contend (Pet. 11-13) that the court of appeals misapplied this Court's decision in *Mitchell II*. That claim is mistaken.

a. In *Mitchell II* this Court held that the United States was accountable in money damages for alleged breaches of trust in connection with its management of forest resources on allotted lands of the Quinault Indian Reservation. After first finding that the Tucker Act, 28 U.S.C. 1491, provided the United States' consent to suit, the Court turned to the question whether the plaintiffs had a substantive right to money damages against the United States. The Court explained that "[a] substantive right must be found in some other source of law, such as 'the Constitution, or any Act of Congress, or any regulation of an executive department' " (463 U.S. at 216 (quoting 28 U.S.C. 1491)). Moreover, "the claimant must demonstrate that the source of substantive law he relies upon ' "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained" ' " (463 U.S. at 216-217 (citations omitted)). Reviewing the applicable statutes and regulations (*id.* at 219-223), the Court concluded (*id.* at 224) that those authorities "clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians." In particular, the Court noted that one provision required the

Secretary, in selling timber from Indian trust land, to consider " 'the needs and best interests of the Indian owner and his heirs' " (*ibid.* (citation omitted)). Another provision explicitly recognized the government's duties in " 'managing the Indian forests so as to obtain the greatest revenue for the Indians consistent with a proper protection and improvement of the forests' " (*ibid.*). The Court concluded (*id.* at 226) that "[b]ecause the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained."

In reaching that conclusion, the Court distinguished its prior decision in *United States* v. *Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*). In *Mitchell I*, the Court held that the Indian General Allotment Act of 1887 did not authorize the award of damages against the United States for alleged mismanagement of the allotted forest lands. The Court acknowledged (445 U.S. at 542) that the Act had created "a limited trust relationship between the United States and the allottee." But reviewing the governing statute, the Court concluded (*ibid.*) that "[t]he Act does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands." In particular, portions of the Act "indicate[d] that the Indian allottee, and not a representative of the United States, is responsible for using the land for agricultural or grazing purposes" (*id.* at 542-543). And the legislative history suggested that the Act did not authorize the government to manage the timber resources for the benefit of the Indian allottees (*id.* at 545).

By contrast, the Court in *Mitchell II* found that the applicable statutes and regulations "clearly give the Federal Government full responsibility to manage Indian resources

and land for the benefit of the Indians" (463 U.S. at 224). Indeed, the Court observed (*id.* at 222 (footnote omitted)), "[v]irtually every stage of the process is under federal control." As the Court put it (*ibid.* (citation omitted)), "[t]he Department of the Interior—through the Bureau of Indian Affairs—'exercises literally daily supervision over the harvesting and management of tribal timber.' "

b. The court of appeals faithfully applied the decision in *Mitchell II* and correctly rejected petitioners' claim. Noting that petitioners were asserting a right to a market value based on the highest price paid or offered for like gas on the same day and in the same field, the court found "no statutory provision on that subject" (Pet. App. 9a). Indeed, the court observed (*ibid.*), petitioners did not even claim that any statute or regulation had been violated. To the contrary, the court explained, the only relevant legal provisions—the governing regulation (25 C.F.R. 212.16) and the leases embodying that regulation—"r[an] counter" (Pet. App. 8a) to petitioners' claims and expressly authorized the Secretary to select the valuation standard that he had adopted. As the court of appeals concluded (*id.* at 9a), "[t]he scope and extent of the fiduciary relationship, with respect to this particular matter, is established by the regulation and leases. [Petitioners] cannot create a viable fiduciary claim purely by insisting that this court (or the Claims Court) establish different or higher standards."

2. Petitioners contend (Pet. 13-14) that the court of appeals should not have upheld the dismissal of their lawsuit for failure to state a claim. The law is settled, however, that a court of appeals "may affirm [a] district court 'on any basis fairly supported by the record.' " *City of Las Vegas* v. *Clark County*, 755 F.2d 697, 701 (9th Cir. 1984) (quoting *Hoohuli* v. *Ariyoshi*, 741 F.2d 1169, 1177 (9th Cir. 1984)). Accord *Fairview Township* v. *United*

States Environmental Protection Agency, 773 F.2d 517, 525 n.15 (3d Cir. 1985); *Katter* v. *Arkansas Louisiana Gas Co.*, 765 F.2d 730, 734-735 (8th Cir. 1985). Applying that rule, the courts of appeals have routinely upheld dismissal of complaints for failure to state a claim, even where, as here, the district court had relied on other grounds. See, *e.g, City of Las Vegas* v. *Clark County, supra* (where district court dismissed action for want of subject matter jurisdiction, court of appeals affirmed under Fed. R. Civ. P. 12(b)(6)); *Getty* v. *Reed*, 547 F.2d 971, 977 (6th Cir. 1977) (where district court dismissed complaint for lack of jurisdiction, court of appeals affirmed on the ground that the claims were insubstantial); *Vaughan* v. *First Nat'l Bank*, 218 F.2d 804, 806 (5th Cir.) (where district court erroneously dismissed action on grounds of res judicata, court of appeals affirmed for failure to state a claim), cert. denied, 350 U.S. 854 (1955). See also *Wong* v. *Bell*, 642 F.2d 359, 362 (9th Cir. 1981) (where "[p]laintiffs cannot possibly win relief under the statute they have urged," a court of appeals may dismiss under Rule 12(b)(6), even though the district court did not act under that provision); *Williford* v. *California*, 352 F.2d 474, 475-476 (9th Cir. 1965) (where district court granted Rule 12(b)(6) motion on erroneous grounds, court of appeals could still affirm dismissal on different grounds that are apparent from the complaint).

The court of appeals correctly applied these principles in the present case. It found that there are no statutes or regulations that give rise to the particular fiduciary duty asserted by petitioners as the basis for this action. Indeed, the court noted that the applicable authorities—25 C.F.R. 212.16 and the leases that embody that regulation—explicitly authorize the method of gas valuation adopted by the Secretary. Because petitioners have offered no support

in substantive law for their demand for larger royalties, the court of appeals correctly upheld dismissal of the action for failure to state a claim.

Finally, the court of appeals did not err in denying petitioners leave to amend the complaint. Petitioners sought such leave from the court of appeals for the first time in their petition for rehearing; their application was thus untimely. In any event, petitioners have had repeated opportunities to amend their complaint, but they have done so without success. Moreover, petitioners' suggestion (Pet. 14-15) that they were somehow surprised by the court of appeals' dismissal is unpersuasive. In essence, the court of appeals found the same defects in petitioners' action as did the Claims Court. Both courts rejected the claimed fiduciary duty because it was without a firm basis in any substantive law. To be sure, the Claims Court, finding that defect, dismissed on jurisdictional grounds, while the court of appeals, finding the same defect, dismissed for failure to state a claim. But from the outset petitioners were on notice that their complaint was insufficient. Having failed at several attempts to recast their allegations, petitioners are not entitled by law to another opportunity to try.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

CHARLES FRIED
Solicitor General
ROGER J. MARZULLA
Assistant Attorney General
ROBERT L. KLARQUIST
MARTIN W. MATZEN
Attorneys

MAY 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60424